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Professor Mooney, Judge Deady, and the Celestial Kingdom

Anyone who heard Professor Mooney present his article on Matthew Deady knows of Mooney's unusual success in combining erudition with clarity, and close textual analysis with the development of broad contextual themes. It was probably less obvious at first hearing that this study of federal judge Deady, and his responses to anti-Chinese activity in the early years of Oregon's statehood, is pathbreaking in several respects. The chance to read Mooney's study in its entirety and to reflect upon it confirms and enhances my initial impression of Mooney's success in crafting a significant contribution to legal history.

Nearly a century ago, Lord James Bryce observed in *The American Commonwealth* that "Western America is one of the most interesting subjects of study the modern world has seen."[1] With his characteristically acerbic touch, Bryce went on to note that in the West, the "most American part of America," one could find distinguishing American features in "the strongest relief."[2] These included a tendency "to relapse into the oldest and most childish forms of superstition," a willingness to allow the "majestic scale of . . . nature" to be "wickedly squandered,"[3] and a routine descent into agitation and discrimination against the Chinese. According to Bryce, this use of race to disguise class conflicts, this repeated appeal to prejudice was immensely effective because "the masses are impatient, accustomed to blame everything and everybody but themselves for the slow approach of the millennium, ready to try instant, even if perilous, remedies for a present evil."[4]

Bryce's insufferable elitism and outrageous racism helped virtu-

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[1] J. BRYCE, 2 THE AMERICAN COMMONWEALTH 680 (1st ed. 1889).

[2] *Id.* at 681.

[3] *Id.* at 683-84.

[4] *Id.* at 372.

ally to bury his insights and prophetic observations. We have long ignored the very subjects that so intrigued Bryce. Indeed, we are just beginning to take the legal history of the West seriously. If we do glance West, we tend to see only California, which preoccupied Bryce as well. Our legal historiography all but ignores the fate of the Chinese and the agitation surrounding immigration during the Gilded Age.[5] Moreover, we know little about lower federal judges in the late-nineteenth century, and virtually nothing about those beyond the Alleghenies.

With his study of Matthew Deady's long career on the federal bench in Oregon, Mooney joins the ranks of Kermit Hall, Stephen Presser, Rayman Solomon, and a small cadre of other scholars beginning to explore the careers of forgotten notables who presided over the lower federal courts in the decades after the Civil War. Judges of that period dealt with new issues of expanded federal jurisdiction and with difficult questions about newfangled statutory and constitutional protections for civil rights. Mooney has discovered remarkably rich materials in Deady's responses to racism and recrudescent states' rights. His study complements recent work by Michael Les Benedict, Lawrence Friedman, Robert Gordon, Charles McCurdy, William Nelson, and William Wiecek. These scholars have forced us to rethink old generalizations about public law in the Gilded Age. Their work, now supplemented by Mooney's provocative study, suggests that it is no longer possible to accept fully Grant Gilmore's wonderful generalization that "[t]he few people . . . who have ever spent much time studying the judicial product of the period have been appalled by what they found."[6]

In delving into Deady's judicial responses to anti-Chinese legal activity and mob agitation, Mooney finds in Deady "an outspoken champion of immigrant Chinese rights and sensibilities"[7] and "strong, even startling evidence" that Deady abandoned his early, rather extreme racism to become "a leading champion of private tolerance and legal equality for all races."[8] Mooney offers insightful speculation about why someone like Deady would be moved to at-

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[5] An important recent exception is McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CALIF. L. REV. 529 (1984).

[6] G. GILMORE, THE AGES OF AMERICAN LAW 60 (1977).

[7] Mooney, *Matthew Deady and the Federal Judicial Response to Racism in the Early West*, 63 OR. L. REV. 561, 586 (1984).

[8] *Id.* at 586.

tempt to protect hated noncitizens.[9]

It is a pleasure to comment on Mooney's fine piece of work. I also very much enjoyed finding clear and convincing evidence that Oregonians miserably fail to live up to a reputation for being cool toward outsiders. But having stood in the shadow of the University of Oregon's Deady Hall, it surely also is my obligation to provide a few additional suggestions and quibbles to repay the honor of being invited to come trailing out to Oregon.

A complementary theme to those Mooney develops to explain Deady's defense of the Democratic position on slavery during the 1850s, and to connect it somehow to Deady's aristocratic rejection of mob agitation in the 1870s and 1880s, might be Deady's belief in the obligation of government to protect fundamental rights. Over and over again, Deady referred to a governmental obligation to protect basic, natural, or inherent rights.

The double problem, of course, is to determine what those rights entail and to specify what a governmental duty to protect actually means. Deady seldom found it necessary to say precisely. Rather, he could adopt a paternalistic stance. This strategy worked wonderfully—it allowed him to defer to democratic judgments most of the time, but to arrogate to himself, as a judge, the final say any time he thought intervention to be necessary. Deady's conveniently vague belief in the obligation of protection may help explain his noteworthy proclamations about the obligation of the federal government to provide protection when the states failed in their duties to do so. Back in the 1850s, such a perspective could entail the duty to protect property in slaves.

This leads me to a second possible unifying factor. Deady may have been shocked, as were others of his time, by the consequences of states' rights agitation; many considered this theory the specific trigger for the dreadful carnage of the Civil War. When Deady fulminated against abolitionists in the 1850s, it was, after all, William Lloyd Garrison, Wendell Phillips, and their allies who were sounding a secessionist theme. But because it was Confederate faith in states' rights that seemed to lead directly to war, the dangers of a weak federal government surely could have a profound, albeit ineffable, effect when the Union was reconstructed. This may help explain Deady's otherwise startling comparison of states' rights jurisdictional arguments, for example, to the shots fired on Fort

[9] *Id.* at 627-37.

Sumter, and his proclamation that state sovereignty claims were efforts to make the fourteenth amendment a dead letter.

One of the strongest elements in Mooney's paper is his success in capturing Deady's willingness to engage, from the bench, in the rough and tumble of all kinds of political conflict. Deady's direct involvement ranged from strident language about remaining faithful to the post-Civil War amendments to the United States Constitution, to terrific, acrimonious debate over habeas corpus jurisdiction with the neo-conservatives of the American Bar Association. In cultivating journalistic proteges, making sure his opinions were widely circulated, and presiding in cases in which his own sons were the attorneys, Deady surely was not far above the battle. In pursuing some of these aspects of Matthew Deady's colorful judicial persona, Mooney has done well to capture elements of a salty, engaged, and engaging personality.

It is always hard to move from the specifics of a judicial career to the general, even when it is a long career that includes important cases and challenges. One could emphasize Deady's response to the threat he saw in the anti-Chinese "communistic mob" more and his attachment to civil rights less than Mooney does. It is possible to doubt Mooney's generalization about the judiciary as the least blameworthy of government branches when it came to legitimizing racism after the middle of the nineteenth century. The United States Supreme Court and lower courts surely did a great deal to emasculate the promise of the remarkable legislative period that followed the Civil War. But Mooney's general interpretation of Deady and his time is compelling; moreover, Mooney tells his story with admirable depth and clarity.

What emerges is an important portrait of a judge directly involved in the legal and political wars of a fascinating period. We probably should only thank Mooney and hope for more. As an Easterner somewhat awed by Oregon's rugged natural beauty, however, I feel I must ask what range Mooney has in mind when he proclaims that he has discovered "the moral summit of Matthew Deady's career." Surely, this is not the butte of some elaborate joke, but I find it difficult to estimate the elevation of this summit on a scale from molehills to the peaks out here where the air is rare. I have no difficulty whatsoever, though, in placing Mooney and his study of Judge Deady near the top of the heap of trailblazers pushing onward and upward toward a better understanding of a vital period in American legal history.